No. 95-590 (3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Petitioner,

vs.

MIKE SMITH PONTIAC, GMC, INC., TERRY TAYLOR, TERRY TAYLOR INVESTMENTS, INC. and BILLY GRUBBS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT MIKE SMITH PONTIAC, GMC, INC.

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QUESTIONS PRESENTED

As presented by Mercedes-Benz of North America, Inc., the issues contain argument and unnecessary detail, prohibited by Supreme Court Rule 14.1.(a). Without admitting that there are any issues worthy of consideration for certiorari, Respondent Mike Smith Pontiac, GMC, Inc. suggests the following is a more appropriate statement of the questions Mercedes attempts to raise:

1. Whether the First Amendment and the *Noerr-Pennington* doctrine render unconstitutional a Florida statute which imposes liability for damages upon an automobile manufacturer for unlawfully preventing one of its franchised dealers from transferring its franchise to a qualified purchaser.

2. Whether the Eleventh Circuit abused its discretion by resolving questions of Florida law based on the "clear and unambiguous" language of a Florida statute rather than certifying those questions to the Florida Supreme Court.

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APPENDIX

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SUMMARY OF ARGUMENT

Reduced to its essence, this case presents only state law issues having no importance to anyone but the parties to this case. Mercedes-Benz of North America, Inc. ("Mercedes"), has been found to have violated Florida law by improperly obstructing the sale of the Mercedes dealership owned by Respondent Mike Smith Pontiac, GMC, Inc. ("MSP")[1] to a buyer whom even Mercedes admitted was qualified to be a Mercedes dealer. Mercedes did so despite the entry of final state administrative orders requiring Mercedes to permit the transfer. Mercedes attempted to give excuse and cover to its illegal actions by filing a complaint with the Florida Department of Highway Safety and Motor Vehicles ("DMV"), the agency assigned the responsibility for enforcing the Florida law at issue, seeking a declaration that Mercedes' actions were lawful even though the Florida statutes clearly prohibited Mercedes' actions.

The DMV dismissed the complaint as improper and ordered Mercedes to permit the sale. After Mercedes refused to obey the DMV's order, the state courts of Florida affirmed that Mercedes' actions were not proper and violated the Florida law. In so doing, the court said that Mercedes' stated reasons for preventing the transfer were "not a proper basis for a transfer challenge." *See Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990), *reh. denied*, 574 So. 2d 142 (Fla. 1990).

This is not a case to which the *Noerr-Pennington* doctrine has any remote application. Mercedes unlawfully prevented the transfer of MSP's franchise to an admittedly qualified buyer on grounds prohibited by Florida law and failed to file a permitted, legally sufficient objection to the proposed transfer. Mercedes' numerous acts over the last decade in preventing the sale did not

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1. MSP has no parent or subsidiary companies.

constitute petitioning activity and were not protected by the First Amendment, but rather, violated the clear and unambiguous statutory mandate that manufacturers such as Mercedes not prevent such transfers *unless* there is a valid objection to the buyer's qualifications. Mercedes' putative constitutional issue does not relate to the facts of this case, and the Eleventh Circuit Court of Appeals thought so little of the argument that it did not even mention the issue in its opinion.

Further, no federal issue is raised by this case and there is no conflict justifying review, particularly in view of the fact that the issue was not even discussed by the Eleventh Circuit in its opinion, or when Mercedes sought a rehearing *en banc*. Moreover, the Eleventh Circuit did not abuse its discretion by deciding state law issues in light of the clear and unambiguous language of a Florida statute, rather than certifying them to the Florida Supreme Court, particularly where Mercedes never sought certification in the proceedings below and the state law issues have no constitutional or federal impact.

REASONS FOR DENYING THE WRIT

I.

CERTIORARI IS NOT WARRANTED TO REVIEW WHETHER THE FIRST AMENDMENT AND THE *NOERR-PENNINGTON* DOCTRINE RENDER UNCONSTITUTIONAL A FLORIDA STATUTE WHICH IMPOSES LIABILITY FOR DAMAGES UPON AN AUTOMOBILE MANUFACTURER FOR UNLAWFULLY PREVENTING ONE OF ITS FRANCHISED DEALERS FROM TRANSFERRING ITS FRANCHISE TO A QUALIFIED PURCHASER.

Mercedes' Petition in this case omits and misstates material facts and the applicable law in an attempt to persuade this Court

to grant a writ of certiorari to consider First Amendment and *Noerr-Pennington* issues that do not exist in this case.[2] As will hereafter be shown, the facts of this case do *not* give rise to application of the *Noerr-Pennington* doctrine, and do *not* present a federal issue of any kind, much less the constitutional issue Mercedes attempts to fashion. A chronological recitation of the facts and evidence in this complex, fact-bound, decade long litigation is excerpted from MSP's Initial Brief before the Eleventh Circuit and attached hereto as Appendix "A." This brief will only deal with those facts relevant to the issues Mercedes claims merit a grant of certiorari by this Court and will include necessary facts that Mercedes omitted or misstated to mislead this Court.

A. The Opinion Below Does Not Involve First Amendment or *Noerr-Pennington* Issues, But Only Issues of Florida Law.

Mercedes' request for issuance of a writ of certiorari is based upon Mercedes' specious claim that its actions in preventing the sale of MSP's dealership were merely an exercise by Mercedes of its right of free speech under the *Noerr-Pennington* doctrine. Mercedes claims that the opinion of the Eleventh Circuit is inconsistent with and conflicts with the opinion of other circuit courts on the proper application of the *Noerr-Pennington* doctrine. This ground is a total fabrication. Factually, since there were no First Amendment or *Noerr-Pennington* issues present in this case, the Eleventh Circuit predictably never addressed these nonexistent issues in its opinion.

Lacking an opinion necessary to create conflict between

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2. Mercedes even redacts key language from its compilation of the statutes, including language that prohibits a manufacturer from modifying the dealer's rights by contract and language giving transfer proceedings priority over termination proceedings. *See* § 320.643(2), Fla. Stat. (1985).

circuits, Mercedes created both the opinion and the conflict out of whole cloth. Mercedes cites part of one sentence from one of MSP's briefs below and then unilaterally concludes that this "phrase" was the basis of the Eleventh Circuit's rejection of Mercedes' purported First Amendment argument. Petition, p. 17. Mercedes then, without any logical basis, misinterprets the "phrase" to say that *Noerr-Pennington* does not apply except to anti-trust cases, and concludes that this is what the Eleventh Circuit held when, in reality, the Eleventh Circuit did not. Mercedes offers this misinterpretation of part of a sentence from one of MSP's briefs as a basis for the United States Supreme Court granting certiorari, even though there is not one word in the Eleventh Circuit's opinion about *Noerr-Pennington* or the First Amendment.

On appeal, the panel[3] of the Eleventh Circuit that considered the case utilized its entire opinion to discuss issues of Florida statutory and common law. *See Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 32 F.3d 528 (11th Cir. 1994). Although it had the advantage of full briefs by all parties, oral argument before the panel, and access to the record on appeal, the Eleventh Circuit did not even mention as noteworthy in its eight (8) page published opinion the issues that Mercedes asserts to this Court are of such import that a writ of certiorari is warranted.

Even the dissent did not mention those issues,[4] dealing

3. The case was heard by 3 judges, 2 of whom are resident in Florida: Circuit Judge Susan Black (former Florida Circuit Court Judge and Federal District Court Judge from the Middle District of Florida), Circuit Judge Rosemary Barkett (former Chief Justice of the Supreme Court of Florida), and Senior Circuit Judge James C. Hill.

4. Mercedes disingenuously characterizes Judge Hill's separate opinion as a "strong dissent." Petition, p. 11. Judge Hill did not even mention (Cont'd)

instead only with whether some of the Florida law questions could be certified to the Supreme Court of Florida for resolution. *See Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 32 F.3d 528, 535 (11th Cir. 1984) (Hill, Senior Circuit Judge, dissenting).[5] After the Circuit Court of Appeals had rejected Mercedes' arguments based on the "clear and unambiguous" language of the Florida statutes, Mercedes filed a Petition for Rehearing and Suggestion of Rehearing *En Banc* that did not warrant a request by even one of the twelve judges on the Eleventh Circuit for a poll on whether a rehearing *en banc* should be granted.[6]

In fact, Mercedes itself did not even claim that *Noerr-Pennington* had any application to this case until very late in the trial court proceedings. *See, e.g.*, R7-118 (a crucial Mercedes' filing not even mentioning *Noerr-Pennington* or the First Amendment). Therefore, this argument was waived. *Cf. Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988).

As a result, there is no basis for Mercedes' illusory First Amendment or *Noerr-Pennington* defenses. A review of the opinion below demonstrates a complete absence of any "conflict" with any other opinion of any court whatsoever, since the Eleventh Circuit rendered no decision and said absolutely

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(Cont'd)
Mercedes' *Noerr-Pennington* argument, and stated that his dissent was "not to take issue with the Court's result or to offer a contrary resolution." *See* MBNA Appendix B, p. 16a.

5. Neither Mercedes nor any other party ever requested certification of those issues to the Florida Supreme Court at any stage of the proceedings below. *See* the discussion of Issue 2, below.

6. *See* MBNA Appendix A, p. 2a.

nothing at all in its opinion regarding the First Amendment or *Noerr-Pennington*. The Eleventh Circuit did not even mention that the issue had been raised, much less state that it had any applicability.[7] Mercedes' Petition does not and cannot cite one statement by the Eleventh Circuit that creates a conflict or could create any confusion among circuits with respect to these issues, much less demonstrate a "real and embarrassing conflict" that this Court's standards require for issuance of a writ of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). If a conflict truly existed on the issue, Mercedes should be able to point to the conflicting language in the opinion.

Supreme Court Rule 10 provides guidance to those seeking to understand this Court's exercise of its judicial discretion in granting review under its *certiorari* jurisdiction. Rule 10.1 advises that "[a] petition for a writ of certiorari will be granted *only* when there are *special* and *important* reasons therefor." (emphasis supplied). That Rule further describes the "character of reasons" which this Court considers when exercising its discretion. *None* of the circumstances addressed are found in the instant case. No special and important public issue of federal

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7. *See Costle v. Pacific Legal Foundation*, 445 U.S. 198, *reh. denied*, 446 U.S. 947 (1980), wherein this Court responded to an argument that:

> This argument was not addressed directly by the Court of Appeals. It would be appropriate, therefore, for this Court not to attempt to resolve it here, even if we had an adequate record to do so.

Id. at 218. *See also Garner v. United States*, 424 U.S. 648 (1976), wherein this Court declined to consider the petitioner's argument, stating:

> [T]hese contentions were not deemed of sufficient merit to warrant discussion below. In these circumstances we consider it inappropriate to reach them.

Id. at 656, fn. 10.

law is involved in this fact-bound diversity dispute involving Florida law, and the absence of discussion of *any* federal issue of law in the Eleventh Circuit opinion demonstrates that very shortcoming in Mercedes' Petition.

B. Mercedes Omits and Misstates Material Facts and the Applicable Law in an Attempt to Obtain Certiorari for First Amendment and *Noerr-Pennington* Issues That Do Not Exist in This Case.

The purported facts that Mercedes claims are necessary to give rise to this defense are that at all times while Mercedes was preventing the transfer of the franchise to Taylor, it was subject to competing claims to the franchise by both Smith and Cutler; that Florida law, namely § 320.643, Fla. Stat. (1985), which limited Mercedes' right to reject a proposed transfer to the transferee's qualifications, allegedly imposed upon Mercedes liability to Smith and Cutler for damages if it approved the Taylor transfer; and that to protect itself from Smith and Cutler, Mercedes was compelled to file a complaint under § 320.643, Fla. Stat. (1985) with the DMV, seeking denial of the transfer to Taylor on grounds other than those specified in § 320.643, Fla. Stat. (1985). Mercedes claims that this complaint constituted a petition, and that by filing the complaint, Mercedes insulated itself from liability resulting from its refusal to permit the transfer to Taylor.

In addition, Mercedes misstates without any citation, "In any event, as the court of appeals expressly found, Mercedes certainly had no subjective intent to interfere with respondent's business relationships by bringing an administrative proceeding before the DMV." Petition, p. 16. **Nowhere did the Florida appeals court or the Eleventh Circuit make such a finding.** Indeed, the record supports a contrary conclusion. The record shows that Mercedes engaged in an extended pattern of conduct lasting more than seven (7) years, going far beyond speech activities, and ending in Mercedes' unlawful refusal to permit

MSP to sell its dealership and transfer its Mercedes franchise to Terry Taylor ("Taylor"). *See* Appendix "A" for identification of Taylor. The obvious purpose of this conduct was to harm MSP, as shown by the simultaneous efforts by Mercedes to terminate MSP's franchise.[8] Mercedes attempts to justify its numerous violations of MSP's rights by claiming it acted solely to protect itself from being sued by two persons who are not parties to this case, Smith and Cutler. *See* Appendix "A" for identification of these individuals. However, as shown below, the record does not support Mercedes' claim.

It was Mercedes that falsely advised Smith that Smith—not MSP—was the owner of the franchise and it was this act that caused Smith to initiate his claim. R25-155. Further, Mercedes fails to state that in April 1986, a year and one half before Mercedes rejected the transfer to Taylor, the Florida Fifth District Court of Appeal ruled that the franchise was owned by MSP—not Smith. The Florida appeal court further held that Smith was at best an employee at will and that if he had any claim against MSP, it was solely for monetary damages. R25-178 - R25-182; MSP Ex. 30 (*See also Mike Smith Pontiac, GMC, Inc. v. Smith,* 486 So. 2d 89 (Fla. 5th Dist. Ct. App. 1986)). Smith never appealed that decision, and Mercedes fails to mention that at no time thereafter did Smith claim that he owned the franchise, nor did he, in fact, ever object to the transfer to Taylor. In disregard for the facts, however, Mercedes continued to claim, as it does today, that Smith—not MSP—was the owner of the franchise and Mercedes

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8. During that entire period of time, Mercedes also refused to deal with MSP in a fair manner, refusing to change the address and phone number for the dealership in its directory after it moved [R34-139]; deliberately sending its mail to the wrong address [R34-139]; refusing to make its personnel available to deal with warranty claims on a regular basis, as it did for its other dealers [R34-146 & 147]; refusing to provide floor plan financing [R26-302; R26-229; R38-120]; refusing to sell parts, except on a COD basis [R34-40 & 138]; and refusing to permit MSP to participate in normal promotions and programs, including its used car program. R34-146 & 147.

continued to rely upon Smith's court-rejected claim as a subterfuge for its unlawful acts in preventing the transfer to Taylor.

The situation is similar with respect to Mercedes' allegations of Cutler's claim. There was no issue that Cutler defaulted on his contract. Contrary to Mercedes' Statement of Facts, MSP notified Mercedes that Cutler had committed a "default" [MBNA Ex. 559]—not that it was "revoking the transfer to Cutler," as misstated by Mercedes at Petition, p. 8. Mercedes acknowledged the default in its letter to MSP dated July 8, 1987, wherein Mercedes represented to MSP in writing that it would "no longer consider" the Cutler transaction but that it would instead consider only the Taylor transfer. MBNA Ex. 74. While Mercedes does state that Cutler, in an attempt to obtain return of his deposit, filed motions for an injunction with the Florida Department of Administrative Hearings (DOAH) and the Florida Circuit Court, it omits to disclose that *prior* to Mercedes' rejection of the Taylor transfer, the DOAH denied Cutler's motion for injunctive relief. MSP Ex. 88. Likewise, the Florida Circuit Court denied Cutler's motion for an injunction, and directed the transfer to Taylor to proceed. R34-106 & 107.[9]

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9. Mercedes also claims it executed a franchise agreement with Cutler. Petition, p. 8. Even though Mercedes did not claim this as grounds for objecting to Taylor at the time, it apparently now claims this fact excuses its misconduct. However, this is merely an additional violation of MSP's rights since the transaction with Cutler had not closed. R34-52. Also, contrary to Mercedes' claim, Mercedes' own witnesses testified that this franchise agreement was contingent upon Cutler closing. R29-245. Mercedes further misstates that MSP fired its manager and gave control of the dealership to Cutler. Petition, p. 8. That is not true [*see, e.g.*, MSP Ex. 239 & MBNA Ex. 559, both acknowledging that Mercedes was still doing business with MSP], and Mercedes' own citation evidences more an effort by its trial counsel to put words in the witness' mouth than support for the statement. The witness stated that his employment terminated February 1, 1987, months before Cutler was approved [R32-41], and that he did not know what happened after that point. R32-61.

Also omitted by Mercedes is the fact that the transfer of the three other franchises did close, and they were transferred to Taylor. R34-124. The other three manufacturers saw no problem with the transfer; they approved the transfer, and none of them were sued by either Smith or Cutler. R26-300. Only Mercedes refused to approve Taylor.

Nor is there any factual issue that Mercedes' rejection of the transfer to Taylor was malicious and had nothing to do with the alleged claims by Smith and Cutler, as Mercedes claimed. Cutler ultimately settled his lawsuit against MSP by giving up his $425,000 deposit [R27-32], and paying even more money ($37,000 [R26-341]) to cover MSP's legal fees. R34-150. Also, Cutler provided a letter informing Mercedes that he gave his "unconditional consent" to the transfer to Taylor. MSP Ex. 141. Cutler dismissed his lawsuit against MSP with prejudice. R24-310. Furthermore, in an unsuccessful attempt to get Mercedes to approve Taylor, MSP settled with Smith and provided to Mercedes an affidavit from Smith stating that he had no objection to the transfer to Taylor. MSP Ex. 145. Mercedes' response was to inquire why MSP thought these consents would affect Mercedes' position. MSP Ex. 146. Mercedes continued to prevent the transfer despite the fact that even its improper and continued excuse for preventing the transfer had now been eliminated.

When Mercedes' omissions are candidly disclosed to this Court and Mercedes' misstatements are corrected, it is clear that Mercedes had no lawful excuse for its conduct. Neither Smith nor Cutler were claiming any interest in the franchise during the period that Mercedes rejected the Taylor transfer. Even after MSP, in a vain attempt to obtain Mercedes' consent to the transfer, obtained both Smith's and Cutler's consent in writing to the Taylor transfer, Mercedes continued to reject the transfer, stating that Smith's and Cutler's alleged claims had nothing to do with its rejection of the transfer. MSP Ex. 146.

In addition, despite Mercedes' claim, §320.643, Fla. Stat. (1985) **imposes no liability** upon a manufacturer for approving a transfer of a franchise. It imposes liability only for illegally rejecting a transfer. The manufacturer's proper concern is not whether the dealer might somehow be violating someone else's rights by transferring the franchise to the wrong person, since the statute does not place the manufacturer in the position of protecting other person's rights. The manufacturer's only proper concern is whether the person to whom the franchise is being transferred is qualified to be a dealer. A manufacturer could approve two, three, or four proposed transferees without incurring any liability. The issue of who is entitled to compel a transfer of the franchise is a contract question involving only the parties to the contract for sale of the dealership. If MSP transferred the franchise to the wrong party, it would face liability for damages under its contract with the right party. However, Mercedes was not a party to those contracts; it was never faced with any potential liability for approving the transferee; and it had no issue on which to petition for relief or prevent the transfer from proceeding by refusing to accept the transferee.

In 1984, years prior to the proposed transfer to Taylor, the Florida District Court of Appeal advised Mercedes in the case of *Mercedes-Benz of North America, Inc. v. Department of Motor Vehicles,* 455 So. 2d 404 (Fla. 2d Dist. Ct. App. 1984), *reh. denied,* 462 So. 2d 1107 (Fla. 1985), that the **sole** basis under which it could reject a transfer was upon the qualifications of the proposed transferee. When the transfer to Cutler was initially proposed, General Motors rejected the transfer based on a position similar to that alleged by Mercedes, namely that the transfer of the franchise required Smith's consent. Its complaint under § 320.643, Fla. Stat. (1985) was dismissed by the Florida DMV for the reason that the only grounds for objecting to a transfer under § 320.643, Fla. Stat. (1985) was the lack of qualifications of the proposed transferee. R24-241 - R24-244; MSP Ex. 48; *see also* MSP Ex. 53, with attachment notifying

Mercedes of this dismissal. Subsequently, when Cutler attempted to enjoin the transfer to Taylor before the DOAH, Mercedes *itself* pointed out to the DOAH that an objection to a transfer under § 320.643, Fla. Stat. (1985) must be based solely upon the lack of qualifications of the proposed transferee! MSP Ex. 97. Yet, to prevent the transfer to Taylor, Mercedes objected to Taylor even though it has **admitted** that it had no objection to Taylor's qualifications. R29-205, R29-220, R29-300, R37-36 & 37.

Finally, Mercedes' argument that it was somehow compelled by the automatic transfer provisions of § 320.643, Fla. Stat. (1985) to file an administrative complaint is without merit. During the course of Mercedes' argument, the trial judge clearly and quickly pointed out the defect in this argument [R37-41 & 42], *i.e.*, if Mercedes genuinely had a concern about competing claims to the franchise, nothing in § 320.643, Fla. Stat. (1985) or the other provisions of the Automobile Dealer's Act foreclosed the use of a declaratory judgment action to obtain a judicial resolution of those claims without obstructing the transfer. Only the Florida courts, not the DMV, had jurisdiction to grant the relief Mercedes claims it was seeking. In addition to knowingly filing an improper administrative complaint under a statute that was restricted to resolving only one issue, the qualifications of the proposed transferee, and knowingly filing it before an administrative body which had no authority to entertain such an improper complaint or to challenge the validity of a state statute, Mercedes never properly verified its complaint, as required by the statute. MSP Ex. 182, p. 10. These facts were omitted by Mercedes because under federal law, Mercedes' use of an illegal process or procedure to prevent the transfer bars any claim by Mercedes for immunity from any damages, notwithstanding *Noerr-Pennington*.[10]

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10. *See, e.g., In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300 (8th Cir. 1985), *cert. denied*, 479 U.S. 1088 (1987), where the Eighth Circuit Court of Appeals stated that:

(Cont'd)

Mercedes says in its Statement of Facts that in light of the alleged claims by Smith and Cutler, it did not know what to do, and that it joined Smith, Cutler, and Taylor as parties to its complaint under § 320.643, Fla. Stat. (1985) so that it could rely on the DMV's order in a proceeding in which all of the parties were bound. Petition, p. 9. However, Mercedes omits to state that when the DMV entered such an order telling Mercedes exactly what to do,[11] Mercedes refused to obey the order even though neither Smith nor Cutler appealed the DMV's order. R34-134. If, in fact, Smith and Cutler had been making claims to the dealership, which they were not, the DMV's decision foreclosed those claims. *See* MSP Ex. 121. In spite of that, however, Mercedes refused to comply with the DMV's order, and continued to reject the transfer to Taylor, still raising as the basis for its rejection the non-existent and/or barred claims by Smith and Cutler, and the liability to Smith and Cutler under § 320.643, Fla. Stat. (1985) that Mercedes invented to justify its actions. R34-132 - R34-134.

It is, therefore, clear from these omissions and misstatements that this case does not contain any First Amendment issues or petitioning claims, much less *Noerr-*

(Cont'd)

> *Noerr-Pennington* does not immunize a defendant from liability for injuries resulting from governmental action secured by illegal means.

Id. at 1313.

11. The DMV ordered the transfer to proceed, stating that "The Complaint contained no allegation that the proposed transferees were not persons qualified to be transferees under 320.643, Florida Statutes," and "Because the Complaint does not raise the issues permitted to be raised by the § 320.643, F.S., it cannot be considered a complaint as contemplated by the statute." MSP Ex. 121.

Pennington concerns, since not one of the necessary facts Mercedes stated were the basis of its claim actually existed. It is because of the total lack of a factual basis for these claims that the First Amendment and *Noerr-Pennington* issues were not applicable and not addressed by any of the three judges sitting on the Circuit Court of Appeals, including the dissenting judge, and that none of the judges of the Circuit Court of Appeals felt that such an issue existed when Mercedes sought a rehearing *en banc*.

C. *Noerr-Pennington* Has No Application to This Case.

Mercedes itself did not even raise the *Noerr-Pennington* argument until very late in the trial court proceedings. *See, e.g.*, R7-118 (a crucial Mercedes' filing not even mentioning *Noerr-Pennington* or the First Amendment). As a result, this argument was waived and cannot now be interposed. *Cf. Yatvin v. Madison Metropolitan School District, supra.*[12]

Further, this Court has already ruled on several occasions that *Noerr*[13] and its progeny do not offer refuge from justice to those who violate the law, but protect only freedom of speech, which is in no way implicated by this case. In *California Motor*

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12. Also, Mercedes argued below that there were numerous subsidiary state law issues. The Eleventh Circuit had no difficulty using the "clear and unambiguous" language of the statute to dispose of the claimed subsidiary issues. However, Mercedes continues to claim that some of these issues warrant further review. While *none* of Mercedes' arguments are well-founded in any event, Mercedes' continued claim that there are other issues besides the putative constitutional issue makes it impossible for this Court to determine whether the putative constitutional issue is ripe for review by this Court, or whether after granting certiorari, this Court may be confronted with some unforeseen issue that prevents its review of the putative constitutional issue.

13. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, *reh. denied*, 365 U.S. 875 (1961).

Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), for example, this Court stated that:

> It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violated a valid statute.

Id. at 514. This Court also stated:

> First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" which the legislature has the power to control.

Id. at 515 (citation omitted).

The Florida Automobile Dealer's Act was designed to prevent a manufacturer from effectuating the abusive tactic of improperly preventing the dealer from selling its franchise by refusing to acquiesce in a proposed transfer for a reason other than those statutorily prescribed, *i.e.,* the proposed transferee's lack of qualifications or moral character. *See* Eleventh Circuit's opinion, MBNA Appendix B, p. 12a. The Act was intended to facilitate the transferability of the franchise since "[d]elaying this process and thus suspending the desired transfer can result in significant financial costs." *See* MBNA Appendix B, p. 12a. As a result, the Act clearly and precisely mandates that a manufacturer "shall not . . . fail or refuse to give effect to, prevent, prohibit, or penalize" any dealer from transferring a dealership for any reason other than the proposed transferee's lack of qualifications or moral character. *See* § 320.643, Fla. Stat. (1985).

Clearly, the Florida legislature has the power to restrict the grounds upon which an automobile manufacturer is permitted to

prevent its dealer from transferring that dealer's franchise. Just as clearly, the Florida legislature has the power to impose liability for damages upon any automobile manufacturer that violates those restrictions by refusing to permit a transfer for reasons that are *not* so authorized, but rather prohibited by law. The First Amendment does not preclude the Florida legislature from enacting such protection for automobile dealers, as has already been held by this Court in *California Motor Transport Co. v. Trucking Unlimited, supra.*

Contrary to Mercedes' argument, the Circuit Courts of Appeal have had no difficulty applying this principle.[14] Mercedes relies heavily upon *Webb v. Fury,* 282 S.E. 2d 28 (W. Va. 1981) in its effort to show that there is a conflict in the case law. *Webb v. Fury* was not a circuit court decision, and in any event, it was subsequently overruled by the West Virginia Supreme Court in *Harris v. Adkins,* 432 S.E. 2d 549 (W. Va. 1993) as a result of this Court's opinion in *McDonald v. Smith,* 472 U.S. 479 (1985). Accordingly, even the non-applicable conflict that Mercedes attempts to show does not actually exist.

Further, in *In re IBP Confidential Business Documents Litigation,* 755 F.2d 1300 (8th Cir. 1985), *cert. denied,* 479 U.S. 1088 (1987), the Eighth Circuit rejected the argument in *Webb v. Fury* that any extension of *Noerr-Pennington* beyond the antitrust context "created blanket immunity for all activities that look like petitioning." *In re IBP Confidential Business Documents Litigation,* 755 F.2d at 1312. The court stated:

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14. In *In re IBP Confidential Business Documents Litigation,* 755 F.2d 1300 (8th Cir. 1985), *cert. denied,* 479 U.S. 1088 (1987), for example, the Eighth Circuit Court of Appeals stated that:

> [T]he first amendment affords no protection to illegal acts.

Id. at 1313.

> This limited extension of the *Noerr-Pennington* doctrine does not support the conclusion that one who seeks to influence governmental action escapes liability for any and all injuries inflicted in the course of genuine petitioning activity. Rather, it simply establishes that courts may not award compensation for the consequences of protected activity. Courts can and do award damages for injuries inflicted as a result of unprotected activity.

Id. at 1313. Mercedes' actions in refusing to recognize the transfer to Taylor do not even remotely resemble petitioning activity.

The fact that Mercedes may have filed extensive litigation does not excuse it from complying with the law while its lawsuits are pending.[15] Mercedes offers no authority whatever that contradicts this conclusion, and as previously mentioned, the Eleventh Circuit thought so little of Mercedes' argument that it

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15. *See, e.g., Commerce Tankers v. National Maritime Union*, 553 F.2d 793 (2d Cir. 1977), *cert. denied*, 434 U.S. 923 (1977), where the Second Circuit rejected the argument that the *Noerr-Pennington* line of cases insulated the defendant from antitrust liability arising out of attempts to prevent the sale of a vessel through litigation seeking to enforce a restraint-on-transfer clause in a collective bargaining agreement. The court stated that:

> those cases do not stand for the proposition that a group boycott that is illegal under the antitrust laws can be immunized from liability by a later law suit to enforce it. Indeed, the language in them indicates to the contrary.

Id. at 800.

did not even bother to discuss it, or even acknowledge that the argument had been made. Because it appears that only Mercedes is confused about this point, it is difficult for one to conclude that it is a matter of great importance for this Court to decide.

This Court has observed in the past that:

> [I]t is very important that we [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). While the instant case is of importance to the parties, the state law issues by which its outcome was determined do not justify a grant of certiorari by this Court.

II.

CERTIORARI IS NOT WARRANTED TO REVIEW WHETHER THE ELEVENTH CIRCUIT ABUSED ITS DISCRETION BY RESOLVING QUESTIONS OF FLORIDA LAW BASED ON THE "CLEAR AND UNAMBIGUOUS" LANGUAGE OF THE STATUTE RATHER THAN CERTIFYING THOSE QUESTIONS TO THE FLORIDA SUPREME COURT.

Mercedes also contends that the Eleventh Circuit erred by not certifying certain state law questions for decision by the Supreme Court of Florida. Mercedes states that these issues of state law were novel, even though virtually all of the issues had

been decided previously by the Florida courts,[16] and, in fact, one of them had been decided by the Florida courts in a case involving the very parties to this petition.[17] Indeed, the Eleventh Circuit panel that decided this case had no difficulty disposing of all of these state law issues by a common sense interpretation of the "clear and unambiguous" language of the statutes, which was consistent with the clearly enunciated public policy giving rise to these laws. MBNA Appendix B, pp. 8a, 14a.[18]

A. Mercedes Never Requested That the Eleventh Circuit Certify Any Issues to the Florida Supreme Court and May Not Now Make Such a Request for the First Time in Its Petition for Certiorari.

Neither Mercedes nor any other party to this case ever asked the Eleventh Circuit to certify any issue to the Supreme Court of Florida. Although one of the judges on the panel raised the issue at the oral argument, Mercedes did not argue at that time that the issues should be certified to the Supreme Court of Florida.[19] After

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16. *See, e.g. Bayview Buick-GMC Truck, Inc. v. GMC*, 597 So. 2d 887 (Fla. 1st Dist. Ct. App. 1992); *Mercedes-Benz of North America, Inc. v. Department of Motor Vehicles*, 455 So. 2d 404 (Fla. 2d Dist. Ct. App. 1984), *reh. denied*, 462 So. 2d 1107 (Fla. 1985).

17. *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990), *reh. denied*, 574 So. 2d 142 (Fla. 1990).

18. Even Judge Hill's separate opinion stated that his dissent was "not to take issue with the Court's result or to offer a contrary resolution." *See* MBNA Appendix B, p. 16a.

19. It is not at all clear that the Supreme Court of Florida would have had jurisdiction over these issues anyway. *See* Constitution of the State of Florida, Article V, Section 3(b)(6).

the Eleventh Circuit ruled against Mercedes on the merits of the appeal, Mercedes filed a motion for rehearing, but even in its motion for rehearing, Mercedes did *not* request that any issue be certified to the Supreme Court of Florida.

The first and only time that Mercedes has ever requested or suggested certification of these issues was in its petition for certiorari. Interestingly, Mercedes does not even contend in its petition for certiorari that those rulings on Florida law by the Eleventh Circuit were erroneous as a matter of Florida law. It would be difficult for Mercedes to make such a claim in view of the fact that the Florida courts have already ruled that Mercedes acted improperly.

Mercedes' belated argument that these issues should be certified to the Supreme Court of Florida is merely another attempt to delay and evade justice. Mercedes elected to allow the Eleventh Circuit to decide these state law issues without seeking certification, even when the matter was raised at oral argument. Having lost in the Eleventh Circuit, Mercedes now wishes to find some other court to reconsider the decision of these issues.

In his concurring opinion in *Lehman Brothers v. Schein,* 416 U.S. 386 (1974), Justice Rehnquist pointed out that the petitioners should have asked for certification earlier, stating that "petitioners seek to upset the result of more than two years of trial and appellate litigation on the basis of a point which they first presented to the Court of Appeals upon petition for rehearing." *Id.* at 393. Justice Rehnquist also emphasized "the considerable discretion of the federal court" in making these decisions (*Id.* at 394), and warned that certification often "entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court." *Id.* at 394.

The litigation between the parties to this Petition has been

going on for almost ten (10) years, five (5) of which have been in the federal courts. Mercedes *never* requested certification in the proceedings below, but now seeks to further delay the resolution of this matter, so that it can again brief and argue those issues before a different court. Those issues have already been adequately resolved by the Eleventh Circuit on the "clear and unambiguous" language of the statute, without procedural objection by Mercedes.[20]

B. The Eleventh Circuit Did Not Abuse Its Discretion by Resolving Questions of Florida Law Because There Was No Unclear Issue of State Law.

The discretionary certification issue does not merit a grant of certiorari. **There is no special and important public issue of federal law involved.** The circuit courts of appeal already uniformly recognize the wisdom of certifying state law issues to state courts where appropriate. In fact, the Eleventh Circuit has itself been a great user of certification, where its use is warranted.[21] Indeed, the law governing the use of certification is

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20. *See, e.g., Kosak v. United States,* 465 U.S. 848, 850, n. 3 (1984), holding that petitioner's argument would not be considered by the Supreme Court where petitioner did not present the argument to the court of appeals.

21. Some might argue it has certified state law issues *too* frequently. Just some of the reported cases it has recently certified to the Florida Supreme Court include *Mosher v. Speedstar Div. of AMCA Intern., Inc.,* 52 F.3d 913 (11th Cir. 1995); *Savona v. Prudential Ins. Co. of America,* 51 F.3d 230 (11th Cir. 1993); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.,* 18 F.3d 1555 (11th Cir. 1994); *Legal Environmental Assistance Foundation, Inc. v. Brevard County, Fla.,* 10 F.3d 1579 (11th Cir. 1994); *Yanakakis v. Chandris, S.A.,* 9 F.3d 1509 (11th Cir. 1993); *Benitez v. Standard Havens Products, Inc.,* 7 F.3d 1561 (11th Cir. 1993); *FDIC v. Verex Assurance, Inc.,* 3 F.3d 391 (11th Cir. 1993); *Georgetown Manor, Inc. v. Ethan Allen, Inc.,* 991 F.2d 1533 (11th Cir. 1993); *Allstate Insurance Co. v. Prasad,* 991 F.2d 669 (11th Cir. 1993); *Dempsey v. United States,* 989 F.2d 1134 (11th Cir. 1993); *Miele v. Prudential Bache*

(Cont'd)

well settled by already existing opinions of this Court, and there is no need for a grant of certiorari in this case. Further, the Eleventh Circuit's decision is in conformity with those already existing opinions of this Court.

In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), this Court has stated that:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . Its use in a given case rests in the sound discretion of the federal court.

Id. at 390-391.

The Eleventh Circuit obviously purposely decided not to certify the state law issues. MSP suggests that the issues raised by Mercedes were not certified because it was not appropriate to do so in view of the fact that with respect to the issues in question, the statutes were "clear and unambiguous." *See* MBNA Appendix B, pp. 8a, 14a.

As this Court stated in *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987):

> It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law . . . As we have demonstrated, . . . this ordinance is neither ambiguous nor obviously

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(Cont'd)

Securities, 986 F.2d 459 (11th Cir. 1993); *LeCroy v. McCollam (In re McCollam)*, 955 F.2d 678 (11th Cir. 1992); and *Securities and Exchange Commission v. Elliott*, 953 F.2d 1556 (11th Cir. 1992). It certifies questions to other state supreme courts, as well. *See, e.g., Corporation of Mercer University v. National Gypsum Co.*, 832 F.2d 1233 (11th Cir. 1987).

> susceptible of a limiting construction. A federal court may not properly ask a state court if it would care in effect to rewrite a statute. We therefore see no need in this case to abstain pending certification.

Id. at 471 (footnotes and citations omitted).

The Eleventh Circuit had no difficulty disposing of the issues that were before it in this case. Indeed, the court stated quite emphatically that the language of the statutes in question was "clear and unambiguous," as was the legislative intent. As in *City of Houston, Texas v. Hill*, it would have been "manifestly inappropriate" for the Eleventh Circuit to certify these issues under these circumstances.

The cases cited by Mercedes do not support its request for certiorari. In most of the cases, the Court granted certiorari to review a constitutional issue, such as the constitutionality of a state statute, only subsequently to decide that it could not or should not do so without first having a definitive interpretation of unclear state law.[22] The Court did not in those cases grant certiorari just so that it could reverse a calculated decision of the circuit court not to certify issues of exclusively state law, as Mercedes asks the Court to do in this case. Nor are the other cases cited by Mercedes any more analogous to the instant case.[23]

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22. *See Bellotti v. Baird*, 428 U.S. 132 (1976); *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988); *Mills v. Rogers*, 457 U.S. 291 (1982); *Elkins v. Moreno*, 435 U.S. 647 (1978); *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207 (1960); *Aldrich v. Aldrich*, 375 U.S. 249 (1963); *Massachusetts v. Feeney*, 429 U.S. 66 (1976); *Zant v. Stephens*, 456 U.S. 410 (1982).

23. In *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), the Circuit Court had expressly stated that it could not determine the state law from reported (Cont'd)

The Eleventh Circuit did not abuse its discretion in deciding these issues, and certiorari should not be granted. In addition to there being no reason to certify to the Florida Supreme Court the issues raised by Mercedes, the prior history of this case establishes that the Florida Supreme Court would not consider these issues by certification. Mercedes attempted to obtain Supreme Court review of the majority of these issues when it lost in the Florida District Court of Appeals, but the Florida Supreme Court denied certiorari. *Mercedes-Benz of North America, Inc. v. Mike Smith Pontiac, GMC, Inc.*, 561 So. 2d 620 (Fla. 1st Dist. Ct. App. 1990), *reh. denied*, 574 So. 2d 142 (Fla. 1990).

(Cont'd)
cases. Even then, the Court did not certify the issue, but merely remanded for a review of whether the issue should be certified. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968) did not even involve certification. The Court merely abstained from making a momentous decision striking down a state statute based on state constitutional law.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by Petitioner, Mercedes-Benz of North America, Inc. should be **denied.**

Respectfully submitted,

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Dated: October 9, 1995

APPENDIX A — EXCERPTS FROM ELEVENTH CIRCUIT BRIEF

* * *

2. *Statement of Facts.*

a. *Identification of parties.*

DEALER was an automobile dealer located in Daytona Beach, Florida which sold and serviced motor vehicles from a common facility under franchise agreements with Pontiac, GMC Truck, Alfa Romeo, and MBNA. [R23-41, L. 5-17]. Initially, a majority share of the stock in the DEALER corporation was owned by one Jerome Ginsburg, and a minority share of the stock was owned by one Mike Smith. [R25-57, L. 18 - R25-58, L.3]. MBNA is a licensee authorized to import and market Mercedes-Benz automobiles in the State of Florida pursuant to Chapter 320, Florida Statutes. TAYLOR is an automobile dealer doing business in Daytona Beach, Florida. FEDERAL INSURANCE COMPANY is an insurance company doing business in the State of Florida.

b. *Termination of Mike Smith's employment.*[2]

DEALER employed Mike Smith as dealer-operator. [R25-37, L. 23-25]. A "dealer-operator" is the person responsible for day-to-day operation of a dealership. [R25-38, L. 24 - R25-39, L. 4].

In early 1985, MBNA accused Smith of submitting false

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2. Facts preceeding MBNA's wrongful rejection of the transfer to TAYLOR in August, 1987, are set forth herein only because the trial court's ruling allowed MBNA to assert defenses barred by the Florida court decisions.

sales reports to MBNA [R25-93, L. 24 - R25-94, L. 4; DEALER's Ex. 8] and of failing to perform under its Franchise Agreement by omitting to make required improvements to the dealership facilities. [R25-105, L. 17 - R25-106, L. 4; DEALER's Ex. 11, p. 1-2]. As a result of these accusations against Smith and a review of the business records, in May, 1985, Ginsburg became convinced that Smith was mismanaging the dealership. [R25-109, L. 13 - R25-118, L. 2]. Smith and Ginsburg entered into an agreement whereby Smith agreed to correct his conduct. [R25-119, L. 17 - R25-120, L. 15; Def. Ex. 1019]. Shortly thereafter, however, Smith violated this agreement and GMAC threatened to terminate DEALER's floor-plan financing because Smith was out of trust. [R25-139, L. 16 - R25-142, L. 1]. Finally, in June, 1985, after Ginsburg confronted Smith with his failure to comply with the agreement and correct his conduct, the problem was resolved when Smith resigned as an officer and director, his employment was terminated, and he assigned his stock to Ginsburg. [R25-143, L. 1 - R25-145, L. 15].

Ginsburg immediately notified MBNA of Smith's termination, apologized for any misunderstanding resulting from Smith's conduct, and requested MBNA's assistance in finding a replacement. [DEALER's Ex. 13].

After Smith resigned, however, he met with the representatives of MBNA and the other franchisers. After this meeting, he told Ginsburg that DEALER could not fire him without the franchisers' consent. [R25-155, L. 7-24]. Smith then filed a lawsuit against DEALER, alleging wrongful termination of his employment. [R25-177, L. 22 - R25-178, L. 1].

In late 1985, the Circuit Court for Volusia County, Florida awarded to Mike Smith an injunction requiring that Mike Smith

be placed back in control of the dealership. [R25-178, L. 216]. Shortly thereafter, however, the Florida Fifth District Court of Appeal stayed the injunction, and in April, 1986, the Fifth District reversed the Circuit Court, holding that the franchise was solely the property of DEALER, that Mike Smith was at most an employee at will, and that his only rights against the DEALER corporation, if any, were merely for the recovery of damages. The Fifth District held that Smith was not entitled to the injunctive relief awarded by the Circuit Court. [R25-178, L. 24 - R25-182, L. 1; DEALER's Ex. 30].

c. *MBNA's attempt to terminate DEALER's franchise.*

On October 23, 1985, MBNA notified DEALER of its intent to terminate the Franchise Agreement, based upon (1) the claim that Smith had submitted false sales reports, (2) the claim that Smith had violated the Franchise Agreement, (3) a claim that DEALER had violated MBNA's rights by terminating Smith in June of 1985 without MBNA's prior consent, (4) the claim that notwithstanding Smith's termination in June 1985, there existed a dispute between the owners or operators of DEALER which had been continuing for more than 90 days, and (5) a claim that DEALER's principals (Ginsburg and Smith) had misrepresented on the dealership application the ownership of Smith's stock in the DEALER corporation. [DEALER's Ex. 25].

In January, 1986, in accordance with Florida law, DEALER filed with the Florida Department of Highway Safety and Motor Vehicles ("DMV") a complaint objecting to the attempted termination. [DEALER's Ex. 29]. As a matter of law, this filing operated to continue the Franchise Agreement in effect according to its terms, pending resolution of the termination dispute. See § 320.641(3), Fla. Stat. (1985).

Appendix A

d. *DEALER's first attempt to sell the dealership.*

John Radey, who was then DEALER's attorney, advised Ginsburg that under Florida statutory and case law, sales of franchises are favored over termination as a means of resolving disputes between a manufacturer and dealer (even when there are valid reasons for termination) since the sale renders the dispute moot and avoids a potential forfeiture by the dealer. [R24-201, L. 16 - R24-202, L. 16]. Radey also advised DEALER that under Florida law, DEALER could transfer the franchise at any time prior to the franchise being terminated by a final order of the DMV. Radey based his advice on the Florida statutes and a reported opinion, *Mercedes-Benz of North America. Inc. v. Department of Motor Vehicles,* 455 So.2d 404 (Fla. 2d DCA 1984), *rev. den.* 462 So.2d 1107 (Fla. 1985). [R24-200, L. 13 - R24-203]. Radey explained that in that case, the Florida Second District Court of Appeal ruled that under Florida public policy, the only basis for a manufacturer rejection of a proposed transfer is the qualifications of the transferee. [R24211, L. 7-22].

Based on Radey's advice, in October, 1986, DEALER proposed to sell the dealership to one Ronald Cutler, conditioned on approval by all of DEALER's franchisers. [R24-212, L. 13-19]. Although MBNA objected, all of the other manufacturers approved. [R34-34, L. 18-22]. Pontiac and GMC initially objected under § 320.643, Fla. Stat. (1985), on the grounds that Smith claimed an interest in the dealership. The DMV dismissed the objection because it did not relate to Cutler's qualifications, the only available issue in a transfer proceeding under § 320.643, Fla. Stat. (1985). [R24-241, L. 19 - R24-244, L. 14]. Pontiac and GMC then approved the transfer. [R24-244, L. 17-19].

MBNA also filed an administrative complaint objecting to

the proposed transfer under § 320.643, Fla. Stat. (1985). [DEALER's Ex. 46]. MBNA's complaint to challenge the transfer to Cutler was filed with the wrong agency, the Division of Administrative Hearings ("DOAH") rather than the DMV. [R24-216, L. 13 - R24-217, L. 6]. Thus, the case was ultimately closed by the DOAH for lack of jurisdiction in August, 1987. [R24-241, L. 16-18; DEALER's Ex. 88].

Despite this, MBNA refused to accept Cutler until Cutler agreed to accept certain conditions which MBNA had no right to impose, including a promise to build a new separate facility for the MBNA dealership. [R34-51, L. 7-19; Def. Ex. 494, portion marked "Dealer Operating Requirements Agreement", "General" provisions, par. H., which lists as a requirement, "Provide proposed plans for an exclusive M-B dealership."]. After Cutler purportedly agreed to these conditions, MBNA finally approved the proposed transfer on April 28, 1987 [R29-311, L. 7-12], notwithstanding the pending termination proceedings or Mike Smith's claimed ownership interest, and DEALER was so notified on May 1, 1987. [DEALER's Ex. 62]. MBNA executed a franchise agreement with Cutler without DEALER's knowledge or consent, even though Cutler had not closed his purchase contract with DEALER or paid DEALER the purchase price. [Def. Ex. 494; R34-52, L. 19-24].

e. *Entry of Recommended Order.*

Shortly after MBNA approved Cutler, the DOAH hearing officer in the termination dispute entered a Recommended Order which had no legal effect unless and until it was adopted by the DMV. [R24-231, L. 23 - R24-232, L. 19; Def. Ex. 432; R34-56, L. 5-22]. Under the Recommended Order, the hearing officer found that Smith had made errors in reporting sales, but that these errors

did not warrant termination of the Franchise Agreement. [R34-93, L. 1-16; Def. Ex. 432, p. 45, ¶ 23]. The hearing officer found that DEALER had not violated the provisions of the Franchise Agreement requiring improvements to the facility (even under MBNA's interpretation of the Franchise Agreement because, among other things, the time for performance had not passed at the time MBNA notified DEALER of its intent to terminate). [Def. Ex. 432, p. 45-46, ¶ 25]. The hearing officer found that Smith did own his stock at the time of application and approval, and that Ginsburg and Smith had not misrepresented the ownership of the stock. [Def. Ex. 432, p. 51-53, ¶ 39-41]. The hearing officer found that although Smith's employment was terminated without MBNA's approval in June of 1985, Florida law invalidated the provision of the Franchise Agreement requiring MBNA's approval. [Def. Ex. 432, p. 48, ¶ 29].

The Recommended Order ruled against MBNA on all of its grounds for termination of the franchise, except one — the hearing officer found that on October 23, 1985, there existed an internal dispute between Ginsburg and Smith which was grounds for termination under the Franchise Agreement. [R34-98, L. 22 - R34-99, L. 9; R24-236, L. 12-16; MBNA's Ex. 432, p. 49, ¶ 31-32]. Radey filed pleadings with the DMV asserting that the conclusion of law was in error because the hearing officer's finding that there was an internal dispute between the owners or operators of DEALER was inconsistent with the hearing officer's finding of fact that Smith was no longer an owner or operator of DEALER due to his termination in June, 1985, four months before the attempted termination. [R34-100, L. 15-R34-101, L. 7]. The Recommended Order was never adopted by the DMV, and therefore, never had any adjudicative effect. [R34-101, L. 8-11].

Appendix A

f. *DEALER's second attempt to sell the dealership.*

In June, 1987, Cutler defaulted on his contract and refused to close. [R25-63, L. 1-3]. DEALER notified MBNA of Cutler's default, and on June 26, 1987, DEALER entered into a new contract to sell the dealerships to TAYLOR. [R23-27, L. 22-R23-28, L. 1; DEALER's Ex. 70, 71, 72, & 73]. On July 8, 1987, MBNA notified DEALER in writing that it would no longer consider the Cutler transaction, and that instead, it would consider only the TAYLOR transaction. [DEALER's Ex. 74].

Cutler filed suit against DEALER in the Circuit Court for Volusia County, Florida, seeking both an injunction preventing the sale and the recovery of his deposit. [R34-105, L. 23-24; Def. Ex. 364]. Cutler also moved the DOAH for the entry of an injunction to preclude MBNA from considering TAYLOR's application in MBNA's still pending proceeding objecting to the Cutler transfer under § 320.643, Fla. Stat. (1985). [R34-106, L. 12-14]. MBNA opposed Cutler's motion for an injunction based on the fact that a transfer proceeding is based solely on the issue of the qualifications of the transferee and cannot be used to resolve other issues. [DEALER's Ex. 97]. The DOAH denied Cutler's motion for an injunction. [R34107, L. 3-6]. The Florida Circuit Court also denied Cutler an injunction and directed the TAYLOR closing to proceed. [R34-107, L. 6-8; R34-106, L. 3-7].

MBNA had no lawful basis under Florida law for objecting to the proposed transfer to TAYLOR since MBNA conceded that TAYLOR was qualified. [R29-300, L. 5-7]. All of the other three franchisers approved the sale to Taylor. [R24-249, L. 21 - R24-250, L. 1]. Even so, MBNA refused to approve the transfer, and on August 28, 1987, MBNA filed under the same § 320.643, Fla. Stat. (1985), a complaint with the DMV against DEALER,

objecting to the proposed transfer, and joining Cutler, Smith, and TAYLOR as parties. [DEALER's Ex. 93].

MBNA's complaint did not allege that TAYLOR was unqualified, as required by § 320.643, Fla. Stat. (1985). [R24-251, L. 9-18]. The only ground cited by MBNA for its objection was that it did not know who had a right to control the franchise because Smith and Cutler allegedly claimed an interest in the franchise, and Smith years earlier, had threatened to sue MBNA if it approved a transfer of the franchise. [DEALER's Ex. 93]. This was not a legal or permitted basis for objecting to the transfer under § 320.643, Fla. Stat. (1985), as had already been determined when GM objected to the Cutler transfer on the basis [R24-241, L. 19 - R24-244, L. 14], as MBNA had acknowledged in its response to Cutler's motion for an injunction [DEALER's Ex. 97], and as was later held by the DMV and the Florida Appeals Court [DEALER's Exs. 121 & 182].

DEALER's contract with TAYLOR involved the sale of all four franchises as well as the real property upon which the dealerships were located. [R34-66, L. 1-8; DEALER's Exs. 70, 71 & 72]. MBNA's objections were expected to be expeditiously resolved in view of the prior similar determinations. [R34-129, L. 12-14]. Therefore, upon MBNA's refusal to approve the transfer, the contract was rewritten so that the other three franchises and the land, together with the dealership's facilities, could be sold separately, and so the Mercedes-Benz "franchise rights" only could be sold in a later, separate closing. [R23-67, L. 11-23; DEALER's Ex. 115]. MBNA was notified prior to this occurrence and advised this was being done to mitigate damages. [DEALER's Exs. 116 & 117].

TAYLOR closed on the purchase of the other three

franchises and the sales and service facilities on October 28, 1987. [R34124, L. 15-21]. In order to permit DEALER to continue operating the Mercedes-Benz dealership pending resolution of the dispute with MBNA, DEALER moved the dealership to an adjoining vacant lot which it leased from TAYLOR [R34-126, L. 22 - R34-128, L. 1], as DEALER had advised MBNA it was going to do [DEALER's Ex. 119, 1st partial paragraph]. This temporary arrangement was agreed upon by TAYLOR and DEALER in the belief that this arrangement would avoid additional damages that would result from DEALER incurring lease obligations, making capital improvements on non-owned property, and incurring moving expenses. [R34-129, L. 11-23]. MBNA refused to accept the allegedly "new" location of the dealership contiguous to the prior sales and service facilities, and continued to send mail to the previous location, and list DEALER in its dealership directory at its prior address. [R34-138, L. 13 - R34-139, L. 24].

On November 9, 1987, as expected by DEALER, the DMV dismissed MBNA's complaint. [DEALER's Ex. 121]. In doing so, the DMV confirmed its prior rulings and stated that **"The Complaint contained no allegation that the proposed transferees were not persons qualified to be transferees under 320.643, Florida Statutes,"** and **"Because the Complaint does not raise the issues permitted to be raised by the § 320.643, it cannot be considered a complaint as contemplated by the statute."** [DEALER's Ex. 121, p. 1, ¶ 3; p. 2, ¶ 6]. The DMV declared MBNA's termination action against DEALER moot because TAYLOR was to be the new franchisee by operation of law.

Despite the dismissal of its complaint by the DMV and approval of TAYLOR, MBNA continued to refuse to approve or

honor the legally recognized transfer from DEALER to TAYLOR, thus preventing the closing. [R34-133, L. 23 - R34-134, L. 1]. Even though both Cutler and Smith were joined as parties in the administrative proceeding, were now bound by the DMV's orders, took no appeal, and sought no stay, MBNA alone continued to refuse to approve the transfer on the grounds that Cutler and Smith might have a right to prevent the transfer to TAYLOR, despite the DMV's ruling that this was not a proper objection. [R34-132, L. 16 - R34-134, L. 1; DEALER's Ex. 182, p. 10].

MBNA appealed the DMV order to the First District Court of Appeal for the State of Florida, claiming that Cutler and Smith claimed an interest in the franchise which justified MBNA's refusal to approve the transfer. [DEALER's Ex. 126; DEALER's Ex. 182, p. 10]. In the summer of 1988, DEALER commenced a lawsuit to enforce the DMV order. [R34-135, L. 22-24]. Before the order could be enforced, MBNA obtained a stay of the order from the DMV by posting a bond executed by MBNA, as principal, and FEDERAL, as surety. [DEALER's Ex. 137].

In November, 1988, all of the Cutler litigation against DEALER was settled. [DEALER's Ex. 141]. Cutler gave up his claim to his deposit (in the amount of $425,000 [R27-32, L. 10-15]), and paid even more money ($37,500 [R26-341, L. 18-21]) to cover DEALER's legal fees. [R34-150, L. 5-8]. Additionally, Cutler provided a letter informing MBNA that he had no objection to the transfer to TAYLOR. [DEALER's Ex. 141]. Cutler dismissed his lawsuit against DEALER with prejudice. [R24-310, L. 17-25].

In April, 1989, shortly before the TAYLOR contract was then scheduled to expire, DEALER settled with Smith and Smith

provided an affidavit reciting that he had no objection to the transfer to TAYLOR. [DEALER's Ex. 145]. Pursuant to the Settlement Agreement, Smith's lawsuit was dismissed with prejudice. [Def. Ex. 1017, p. 2, ¶ 4]. Even after being notified of these settlements, MBNA continued to refuse to approve the TAYLOR transfer, and MBNA's attorney sent Radey a letter in May 1989 inquiring why DEALER thought these settlements would affect MBNA's position. [DEALER's Ex. 146].

The Florida First District Court of Appeal affirmed the DMV's order on May 3, 1990. [DEALER's Ex. 182]. In so doing, the court stated that:

> **MBNA's complaint was silent as to the qualifications of the Taylor transferees. In fact, the only basis for MBNA's complaint was its fear that Cutler, the first-proposed transferee, would successfully force a transfer under the original transfer agreement. Since this is not a proper basis for a transfer challenge, the Department correctly dismissed the complaint.** [DEALER's Ex. 182, p. 10].

MBNA sought review by the Florida Supreme Court. It was ultimately denied on October 18, 1990 [DEALER's Ex. 191], over three years after the TAYLOR closing was originally to occur under the contract, but for MBNA's conduct. [R23-72, L. 23 - R23-73, L. 9]. On May 1, 1990, however, despite several contract extensions, DEALER's contract with TAYLOR expired and TAYLOR refused to further extend the closing date due to changing market conditions, economic climate and the unavailability of financing. [DEALER's Ex. 185; R23-80, L.

9-22; R23-98, L. 15-24]. DEALER brought the present action against MBNA and FEDERAL for its resulting damages.

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